IN THE COURT OF FINAL APPEAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL No. 8 OF 2022(CIVIL)
(ON APPEAL FROM CACV NO. 183 OF 2019)

BETWEEN:

Q

Appellant

and

COMMISSIONER OF REGISTRATION

Respondent

AND

IN THE COURT OF FINAL APPEAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL No. 9 OF 2022(CIVIL)
(ON APPEAL FROM CACV NO. 184 OF 2019)

BETWEEN

TSE HENRY EDWARD

Appellant

and

COMMISSIONER OF REGISTRATION

Respondent

AMENDED CASE FOR THE APPELLANTS

References:
[A/1/2] = Part A of the Record, Tab 1/Page 2.
[BA/3/4] = Part B of the Record, Part A/Tab 3/Page 4

Introduction

1 These appeals concern the policy of the Commissioner of Registration ("the Commissioner") in relation to allowing a transgender person to have a Hong Kong Identity Card ("HKID") which identifies with their acquired sex.

2 Each of the Appellants was born female, but has, since a young age, identified themselves as male and were diagnosed as having gender dysphoria. As the Court of Appeal stated at paragraph 2 of its Judgment[1],

> "Thanks to the treatments they received over the years, including mastectomy, hormonal treatments and living a real life as male, they and their specialist doctors have confirmed that they have each completed their transition to the male gender and that they are no longer experiencing dysphoria".

3 However the Commissioner has adopted a policy that will only allow them to have a HKID which identifies them as male if they undergo sex reassignment surgery ("SRS") which would involve the removal of their uterus and ovaries and the construction of an artificial penis ("the Policy")[2]. Such surgery is not medically necessary to treat their gender dysphoria. The Appellants also do not wish to undergo such unnecessary surgery.

4 The Appellants' case is that the policy of the Commissioner unlawfully, in breach of Article 14 of the Hong Kong Bill of Rights ("BOR"), compels them to choose between suffering the discrimination, humiliation, violation of their dignity and invasion of their privacy resulting from having to reveal to third parties their transgender status when showing their HKID, or undergoing major surgery which amounts to an interference with their

[1] [A/6/76]

[2] [BF/66/696-700]

physical and bodily integrity. To impose such a requirement for unnecessary surgery as the price of recognition of their acquired sexual identity is disproportionate to any legitimate purpose given the adverse impact of the requirement on each of the Appellants.

5 On 13 May 2022, the Court of Appeal granted the Appellants leave to appeal to this Court on four questions of law, including whether the treatment of the Appellants gives rise to cruel, inhuman or degrading treatment contrary to Article 3 of the BOR.[3] The Appellants recognise that a finding that the policy is consistent with Article 14 would make it exceptionally difficult for them to pursue an argument that the policy is nevertheless a breach of Article 3. They will therefore focus their submissions on the complaint of a breach of Article 14 (informed by Article 3 considerations).

The factual background

6 As the Court of Appeal noted at paragraphs 21-25 of its Judgment[4], Q was born in Hong Kong in 1992. He is a Hong Kong permanent resident and also a citizen of the United Kingdom. He has identified himself as a male from an early age, both in Hong Kong and when he moved to England for secondary education in 2011.[5] Q's gender dysphoria was diagnosed in Hong Kong in 2012. He has thereafter lived as a male, has received testosterone treatment and has developed a male appearance and physique. He underwent an irreversible mastectomy to remove all breast tissue in 2015[6]. ~~6~~ His British passport states his gender as male.[7] As the Court of Appeal noted at paragraph 23 of its Judgment, Q has stated in his Affirmation that

3 [A/8-9/143-150].

4 [A/6/86-87].

5 Q's Affirmation [BB/3/69-70], at paragraphs 10-14.

6 Q's Affirmation [BB/3/70-72], at paragraphs 15-19, 25-28.

7 Q's Passport [BE/56/616].

he has "made an informed decision not to undergo [SRS]" because of the risks, complications and pain of surgery, the disruption to his studies and career, and the fact that he is:

> "comfortable with the way my body now is ... . I do not feel any medical necessity to undergo medical sterilization or reconstructive organ surgery."[8]

But (as he explains at paragraphs 38-39) he is unable to work or study or interact with most service providers in Hong Kong without disclosing his HKID which will result in "discrimination, abuse and victimisation in day to day living" unless he undergoes SRS which is medically unnecessary.

7 As the Court of Appeal noted at paragraphs 26-29 of its Judgment[9], Mr Tse was born in Hong Kong in 1991. He is a Hong Kong permanent resident and a citizen of the United Kingdom. He has identified himself as a male from an early age, both in Hong Kong and when he moved to England for secondary education[10]. After he went to the UK for educational purposes, he sought medical assistance. He received hormone treatment and has had a mastectomy. In 2012, he was issued with a UK passport stating his gender as male. In 2016, after he had lived as a male for 4 years, he was issued with a UK Gender Recognition Certificate as a male under section 9 of the Gender Recognition Act 2004. Mr Tse decided not to undergo SRS as he was advised by his doctor that it was not medically necessary to treat his gender dysphoria.[11] As he explains at paragraphs 41-46 of his Affirmation[12], and as the Court of Appeal recognised at paragraph 28 of its Judgment[13], he has

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8 Q's Affirmation [BB/3/71, 73], at paragraphs 20-24 and 35-39.

9 [A/6/88-89]

10 Mr Tse's Affirmation [BB/14/276-279], at paragraphs 6 and 8-15.

11 Mr Tse's Affirmation [BB/14/284] at paragraph 38.

12 Mr Tse's Affirmation [BB/14/285-287].

13 [A/6/88-89]

suffered embarrassment, distress and loss of dignity by reason of having to show a HKID which identifies him as female. To show his HKID to immigration officers, bank tellers and others (such as mobile phone sales persons) discloses a difference between how he presents and the contents of the card and so discloses his transgender status.

8 Each of the Appellants has an external masculine physical appearance. They each present socially as male, and they live their lives as men. Their specialist doctors have confirmed that they each have completed their transition to the male gender and they no longer experience gender dysphoria.[14] Their doctors have confirmed that there is no medical reason for them to undergo further or more invasive medical treatment.[15]

The decisions under challenge

9 The Commissioner refused to allow the application by Q to amend his HKID sex identifier on 31 July 2015.[16]

10 The Commissioner refused to allow the application by Mr Tse to amend his HKID sex identifier on 11 January 2017. [17]

11 In each case the reason given was that the applicant had not completed SRS. As the Commissioner stated:

> "Persons who have completed sex re-assignment surgery (SRS) (removal of the original genital organs and construction of some form

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14 For Q, see the letter from Dr Curtis at [BE/54/585] and the letter from Dr Mak at [BE/57/617-618] and the letter from Dr Garramone at [BF/65/695]. For Mr Tse, see the letter from Dr Saoudi at [BF/76/753].

15 Q's Affirmation, at paragraph 24 [BB/3/71]. For Mr Tse, see the letter of Dr Saoudi at [BF/76/753].

16 Commissioner's Letter dated 31 July 2015 [BF/64/692-694].

17 Commissioner's Letter dated 11 January 2017 [BF/78/759-761].

of the genital organs of the opposite sex) may make an application for the amendment of the sex entry on his/her identity card.
...

We understand that the Applicant has not received any SRS. In your letter ... you indicated that the Applicant has 'taken an informed decision not to undergo SRS'. In the circumstances and having carefully considered the Application, the Commissioner does not consider that there are sufficient grounds or reasons to accede to the Application. The Application is therefore refused."

12 As stated in paragraph 1 of the Judgment of the Court of Appeal[18], the Commissioner has adopted the Policy set out as follows:[19]

"Generally speaking, persons who have received different forms of treatments by professional psychiatrists and clinical psychologists, including psychotherapy, hormonal treatment and real-life experience of the chosen gender role for a period of time may be recommended for sex re-assignment surgery (SRS).

Persons who have undergone the above treatments and have completed SRS should follow the below procedures and submit application together with the relevant supporting documents to reflect their change of sex on their identity cards:

(a) produce a medical proof which should indicate that the following criteria for the completion of SRS are met:

(i) for sex change from female to male

- removal of the uterus and ovaries; and
- construction of a penis or some form of a penis;

(ii) for sex change from male to female

- removal of the penis and testes;
- construction of a vagina.

(b) in general, the medical proof should be produced by the doctor who performed the SRS in accordance with the criteria as set out above;

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18 [A/6/75-76]

19 Q22 on Immigration Website [BF/77/754-758].

...".

13 As the Court of Appeal noted at the end of paragraph 1 of its Judgment, there is an exception: an applicant is not required to complete SRS if they can prove that they cannot undergo the surgical procedures for medical reasons. See the Registration of Persons, Sub-Divisional Instruction No. 1/2012, dated 3 April 2012[20] at paragraph 5 referring to "individual cases with justifiable medical reasons that the SRS cannot be completed".

The Judicial Review Proceedings

14 The Appellants each brought separate judicial review proceedings which were directed to be heard together in a rolled-up hearing.

15 On 1 February 2019, Au J (as he then was) at paragraphs 122–123 of his judgment[21] granted leave to bring judicial review but dismissed the substantive judicial review applications.

16 On 26 January 2022, the Court of Appeal dismissed the Appellants' appeals.[22]

17 As mentioned in paragraph 5 above, on 13 May 2022, the Court of Appeal granted the Appellants leave to appeal to this Court.

The relevant Legal Provisions

18 The Commissioner is a public officer appointed under section 2 of the Registration of Persons Ordinance, Cap 177 ("the Ordinance") and is empowered to enact regulations under the Ordinance.

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20 Sub-Divisional Instruction No.1/2012 [BD/36/508-512].

21 [A/3/66]

22 [A/4-5/68-69, 71-72]

19 The Registration of Persons Regulations, Cap 177A ("the Regulations") provide for:

(1) the registration of and recording of particulars relating to persons who have the right of abode in Hong Kong; and

(2) the issue, carrying, and production of identity cards and for purposes connected therewith.

20 Regulation 3 imposes a duty to apply for a HKID (unless exempted or excluded).

21 Regulation 11 provides for a duty to carry a HKID and makes it a criminal offence to fail to produce the HKID for inspection when required to do so by an immigration officer or police officer.

22 Regulation 4(1)(b) states that every person who applies for an identity card under the Regulations shall:

> "furnish to a registration officer, in such form as the registration officer may require, particulars of-
> ...
> (vi) his sex;
> ...
> (xii) such further particulars relating to any of the particulars furnished under this paragraph as the registration officer may consider necessary, and shall acknowledge the correctness of the contents of the particulars by signing in such place in the form as may be indicated".

23 Regulation 14(1) provides that a holder of an identity card may apply to a registration officer:

> "(a) for alteration of that card".

24 Regulation 14(2) states that:

> "The registration officer shall only issue a replacement identity card -
> (a) after the identity card has been surrendered to him;
> (b) after the production of such evidence, under oath or otherwise, as he may require; and
> (c) after such investigation as he may consider necessary."

25 Regulation 18(1) requires a person who has submitted particulars which have since become incorrect, and which particulars are shown on their HKID, to report that fact to the registration office.

26 Regulation 18(2) empowers the registration officer to consider whether it is necessary to alter the HKID and to require the surrender of a HKID if an alteration is required.

27 Regulation 19 provides that it is a criminal offence for a person, without reasonable excuse, to contravene Regulation 18.

28 Article 4 of the Basic Law states:

> "The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law."

29 Article 39 of the Basic Law states that the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

30 The provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong are implemented in Hong Kong by the Hong Kong Bill of Rights Ordinance which includes the BOR.

31 Article 3 of the BOR provides that:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

32 Article 14 of the BOR states:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

The Medical Evidence

33 The Appellants draw particular attention to the Affirmation of Dr Stephen Winter[23], a psychologist who has specialised in the health and welfare of transgender persons for 37 years. He was a member of the Board of Directors of the World Professional Association for Transgender Health ("WPATH"), a transnational organisation of health care specialists in the transgender field which issues the WPATH Standards of Care which provides professional guidance to medical professionals on transgender healthcare worldwide and a member on the WPATH Standards of Care revision committee.[24]

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[23] [BB/11/166-199].

[24] Dr Winter's Affirmation, paragraph 3 [BB/11/167].

34 Dr Winter explained at paragraph 18 of his Affirmation[25] that transgender people are those who "identify in a gender other than the one that matches their sex assigned at birth ...".

35 He added at paragraph 23[26]:

> "Many transgender people experience gender dysphoria; distress or discomfort arising out of and related to their gender incongruence".

36 He explained at paragraph 29[27]:

> "The ultimate medical treatment objective for a person experiencing gender dysphoria is to ensure that the person is able to live and to be accepted in the gender in which they identify".

37 Dr Winter further stated[28]:

> "56 while sterilization and reconstructive surgery may be a medical necessity for many transgender people experiencing physical dysphoria, without which they may be at risk of self-harm or suicide, a significant number of transgender persons find that hormones and/or breast surgery, are sufficiently effective to physically alter their body so as to alleviate their feelings of discomfort or distress about their body (their physical dysphoria).
>
> 57 It is only when the body dysphoria results in distress which cannot be alleviated by less intrusive methods will a clinician assess and recommend more intrusive surgical options as they

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25 [BB/11/170-171].

26 [BB/11/172].

27 [BB/11/173-174].

28 [BB/11/182].

are medically necessary.

58 For these reasons, I cannot emphasise enough that it is clinically incorrect to review sterilization and genital surgery as medically necessary for all transgender people".

38 Dr Winter pointed out at paragraph 60[29] that:

> "… there is a consensus among contemporary transgender healthcare providers that a transgender person's change of sex is complete when their gender dysphoria is reduced to such an extent that enables them to live and be accepted as a member of their experienced gender. This therefore leads to what they consider as a full and happy life. They are the best judges thereof".

39 At paragraph 84[30], Dr Winter explained that his 30 years of practice in Hong Kong working with transgender clients has led him to conclude that:

(1) The Policy "creates a distinction between two groups of transgender people (those who have undergone surgery and those who have not) which is arbitrary in health terms".

(2) The Policy "places an undue pressure upon some transgender individuals to undergo surgery which is not medically necessary for the reduction of physical dysphoria". He added at paragraphs 89-90[31] that he had worked with transgender clients in Hong Kong who have undergone SRS "not because of any medical necessity" but because of their concerns that

> "without a gender congruent identity card they will continue

[29] [BB/11/182].
[30] [BB/11/188-189].
[31] [BB/11/190].

> to suffer from stigma, discrimination and harassment when applying for jobs, entering buildings, banking services and engaging in a wide range of daily activities which require the presentation of such an identity document".

40 At paragraphs 93-105[32], Dr Winter referred to international bodies, including the World Health Organisation ("WHO"), which state that transgender people should be recognised in their acquired sex without SRS. See also paragraph 61 below.

41 That treatment for transgenderism is individual-based and there is no mandatory medical requirement for an individual to undergo SRS is agreed by the Commissioner's expert, Dr Ho. He stated in his First Affirmation at paragraph 16:[33]

> "Optimal care plan for each individual with GD [gender dysphoria] symptoms is made to relieve GD through full discussions on all aspects of each state of treatment, in the best interest of the individual. All care decisions will be made with the individual's fully informed consent and can be stopped by them at any stage, when they feels [*sic*] content with what has been achieved up to that stage, in light of the severity of his or her GD symptoms, and what more has to be done, and will and can be achieved, by going further. The aim is to relieve GD symptom to a level acceptable to them, and not so much, from the viewpoint of the medical practitioner, necessarily to effect or complete any change in the sex of the individual, and at present there is no general consensus amongst the medical profession in terms of explicit criteria as to when a person's change of sex is 'completed'."

He added at paragraph 19[34] that:

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32 [BB/11/191-196].

33 [BB/5/89-90].

34 [BB/5/91-92].

> "Whether SRS is necessary or not is voluntarily decided by the patients ..."

42 Dr Winter generally agreed, but emphasised at paragraphs 80-82[35] of his Affirmation that it is "misleading" to suggest that those who seek surgery "in some way represent the more serious cases of transsexualism". Dr Winter explained that the "severity of transsexualism" is:[36]

> "best measured in terms of the strength of desire an individual expresses to live and be accepted in their experienced gender, and not by the nature and type of any gender-affirming healthcare sought by the individual which may be determined by factors which are not medical at all …"

For example, the need to obtain an HKID. And as this Court recognised in W v Registrar of Marriages (2013) 16 HKCFAR 112 at paragraph 12 (Ma CJ and Ribeiro PJ for the Court), there are transgender persons who are:

> "not willing to face the painful process of surgery with what may be an uncertain outcome, especially in the case of female to male transsexuals where the surgery is more complex and difficult".

The criteria for applying Article 14 of the BOR

43 It is well-established that:

(1) The rights protected by the Basic Law and by the BOR must be given a "generous interpretation" to ensure "the full measure of fundamental rights and freedoms so constitutionally guaranteed": Ng Ka Ling and others v Director of Immigration (1999) 2 HKCFAR 4,

[35] [BB/11/187-188].

[36] [BB/11/188], at paragraph 82.

28J-29A (Li CJ for the Court).

(2) Restrictions on constitutional rights must be "narrowly interpreted": Leung Kwok Hung and others v HKSAR (2005) 8 HKCFAR 229, 248, paragraph 16 (Li CJ for the Court).

(3) The Basic Law is "a living instrument" which is "intended to meet changing needs and circumstances": Ng Ka Ling at 28D.

(4) "Privacy" is a concept inherently linked to a person's dignity: Democratic Party v Secretary for Justice [2007] 2 HKLRD 804 at paragraphs 57-60 (Hartmann J).

44 There are two main questions in relation to the application of Article 14 of the BOR in the circumstances of this case:

(1) Is the Policy, and the decisions made by reference to it, within the scope of Article 14 of the BOR?

(2) If so, is there a justification for the interference with the rights protected by Article 14?

The scope of Article 14 of the BOR

45 The Court of Appeal correctly accepted (at paragraph 30 of its Judgment[37]), and the Commissioner has not disputed, that Article 14 of the BOR covers both:

" the right to gender identity and the right to physical integrity".

46 Although the scope of Article 14 is not in dispute, it is important to

[37] [A/6/90].

emphasise the reasons why sexual identity falls within Article 14 because the strength of the interests involved are relevant to the strength of the justification required for an interference with the right.

47 The Court of Appeal rightly recognised (at paragraph 31 of its Judgment[38]) that

> "Gender identity is one of the most crucial identities of a person".

48 The Court of Appeal cited with approval (at paragraph 31 of its Judgment[39]) the judgment to like effect of the European Court of Human Rights ("ECtHR") in YY v Turkey (Application No. 14793/08, Judgment dated 10 March 2015), paragraphs 56-60.

49 The ECtHR returned to this issue in AP, Garçon and Nicot v France (Application Nos. 79885/12, 52471/13 and 52596/13, Judgment dated 6 April 2017), a case in which the ECtHR held that it was a breach of Article 8 of the European Convention on Human Rights (ECHR) for the State to impose a policy that a transgender person could not have their acquired sexual identity recognised unless SRS was carried out:

(1) The ECtHR stated at paragraph 92 that the concept of "privacy" under Article 8 covers:

> "not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of [ECHR] ...".

38 [A/6/90].
39 [A/6/90].

(2) The ECtHR added at paragraph 93 that:

> "the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 … [which] has led it to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination ... of which the freedom to define one's sexual identity is one of the most basic essentials ... . It has also found that the right to of transgender persons to personal development and to the physical and moral security is guaranteed by Article 8 ...".

(3) The ECtHR noted at paragraph 94 that:

> " The Court's judgments in this sphere have hitherto concerned legal recognition of the gender identity of transgender persons who had undergone reassignment surgery (see … B v France … Christine Goodwin v the United Kingdom …and Y.Y v Turkey…) However, it cannot be inferred from this that the issue of legal recognition of the gender identity of transgender persons who have not undergone gender reassignment treatment approved by the authorities, or who do not wish to undergo such treatment, does not come within the scope of application of Article 8 of the [ECHR]."

(4) Therefore the ECtHR concluded at paragraph 95:

> "The right to respect for private life under Article 8 of the [ECHR] applies fully to gender identity, as a component of personal identity. This holds true for all individuals."

50 The Court of Appeal correctly recognised at paragraph 38 of its Judgment[40] that:

> "what is engaged under BOR 14 in the present context is [the Appellants'] right to state their acquired gender in the sex entry on their identity card, thereby enabling them, when using or presenting their identity card, to express their acquired gender, and conduct their life and affairs accordingly".

And, the Appellants would add, avoid the invasion of privacy, humiliation, embarrassment and loss of dignity which follows from having to reveal to strangers their transgender status because the sex mentioned on their identity cards is distinct from their physical and social appearance, and to avoid the invasion of their physical and bodily integrity just to obtain a gender congruent identity card.

51 Article 14 of the BOR is therefore engaged in the present case: the Policy intrudes on a core aspect of the identity of the Appellants, resulting in an invasion of their privacy, humiliation, embarrassment and loss of dignity, and imposes on them a dilemma of whether to accept the breach of their privacy rights or to undergo invasive and medically unnecessary surgery which would breach their right to bodily integrity.

Justification for an interference with Article 14 rights

52 As the Court of Appeal noted at paragraphs 33 and 40 of its Judgment, there may be public interests which justify an interference with the rights protected under Article 14 of the BOR. It is well-established that the courts apply a proportionality test which involves four steps:

(1) Does the measure pursue a legitimate aim (Step 1)?.

[40] [A/6/92].

(2) Is the measure rationally connected to that aim (Step 2)?.

(3) Is the measure no more than is reasonably necessary (although in some contexts a broad margin of discretion is accorded to the decision-maker) (Step 3)?.

(4) Whether a reasonable balance has been struck between the benefits to society and the intrusion into the rights of the individual, focusing on whether there has been an unacceptably harsh burden on that individual (Step 4).

See Hysan Development Co. Ltd and others v Town Planning Board (2016) 9 HKCFAR 372 at paragraphs 134-135 (Ribeiro PJ for the Court)

Legitimate aim and rationality: Steps 1 and 2

53 The Appellants do not dispute that Steps 1 and 2 are satisfied in this context:

(1) The Policy pursues a legitimate aim: as the Court of Appeal stated at paragraph 46, the Policy aims to provide consistent, certain and objective criteria in relation to applications for a change of the sex identity on a person's identity card.

(2) The Policy is rationally connected to that legitimate aim.

Proportionality: Step 3

A stringent standard of scrutiny: no more than reasonably necessary

54 The Court of Appeal correctly stated at paragraph 50 of its Judgment:

> "it is axiomatic that when the core values relating to personal or human characteristics in terms of gender identity and physical integrity are engaged, a social policy ... must be subject to the court's vigilant scrutiny by the more stringent standard of 'no more than necessary': see Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409, paragraph 77 (Ma CJ for the Court)."

55 The same approach was adopted by the ECtHR in Lustig-Prean and Beckett v United Kingdom (2000) 29 EHRR 548, 580, paragraph 82: where the interference with rights protected by Article 8 of the ECHR concerns "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such an interference could be justified. The ECtHR applied that principle, in that case, in relation to the organisation of the armed forces of the United Kingdom - a context in which the State would normally enjoy a broad margin of discretion.

56 The present case falls into that category: the Policy interferes with a "most intimate part of an individual's private life": their sexual identity and the disclosure of it to others. Furthermore, the Policy interferes with the physical integrity of the Appellants, requiring them to submit to major surgery as the price of recognition in their HKID of their acquired sexual identity and as the price of avoiding the harm done to them by having to disclose their transgender status to strangers on the use of their HKID.

The approach taken by the European Court of Human Rights

57 In AP, Garçon and Nicot v France, the ECtHR considered (see paragraphs 94 and 100) whether it was a breach of Article 8 of the ECHR for French law to make the legal recognition of the acquired sexual identity of a transgender person for the purpose of their identity documents dependent on proof of the "irreversible nature of the transformation" by medical means (i.e. sterlisation and sex reassignment, see paragraphs 83 and 113).

58 At paragraph 122, the ECtHR noted that "[t]here is no consensus on the matter" in the Contracting States, many of them imposing - at that time - a sterilisation condition. The ECtHR also there noted that:

> “public interests are at stake, with the Government pleading in that regard the necessity of safeguarding the principle of the inalienability of civil status and ensuring the reliability and consistency of civil-status records, and that the present case raises sensitive moral and ethical issues.”

59 At paragraph 123, the ECtHR emphasised that:

> "an essential aspect of individuals’ intimate identity, not to say of their existence, is central to the present applications. This is so, firstly, because the issue of sterilisation goes directly to individuals’ physical integrity, and secondly because the applications concern individuals’ gender identity. In this regard, the Court has previously stressed that ‘the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8’… and that the right to gender identity and personal development is a fundamental aspect of the right to respect for private life… This finding leads it to conclude that the respondent State had only a narrow margin of appreciation in the present case.”

60 At paragraph 124, the ECtHR noted that there was a "trend" in European States towards abandoning the impugned condition, “driven by developments in the understanding of transgenderism ."

61 At paragraph 125, the ECtHR further noted that:

> "numerous European and international institutional actors involved in the promotion and defence of human rights have adopted a very clear position in favour of abolishing the sterility criterion, which they regard as an infringement of fundamental rights.".

The ECtHR at paragraph 125 further drew attention to statements by the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur

on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the WHO, the United Nations Children's Fund, the United Nations High Commissioner for Human Right, UN Women, UNAIDS, the United Nations Development Programme and the United Nations Population Fund in favour of abolishing the sterility criterion which they regard as an infringement of fundamental rights (as set out in paragraphs 73-81 of the Judgment).

62 At paragraph 126, the ECtHR noted that not all transgender persons wish to or can undergo SRS and highlighted that some individuals "nevertheless agreed to this constraint in the hope of securing a successful outcome … concerning the amendment of their civil status." The ECtHR stated at paragraph 127 that these:

> "Medical treatments and operations of this kind go to an individual's physical integrity, which is protected by Article 3 of [ECHR] … and by Article 8".

63 The ECtHR pointed out at paragraphs 128-129 that to impose medical treatment on an adult of sound mind without his or her consent is an interference with the right to physical integrity. The ECtHR added at paragraph 130 that:

> "Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which, as previously stated, is a fundamental aspect of the right to respect for private life ...".

64 The ECtHR therefore stated at paragraph 131 that:

> "Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of [ECHR] conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of [ECHR]".

65 At paragraph 132, the ECtHR stated that it:

> "fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest".

But, the ECtHR concluded, the requirements imposed by French law imposed an "impossible dilemma" on transgender persons not wishing to undergo SRS:

> "Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the [ECHR]; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned".

66 The ECtHR therefore concluded at paragraph 135 of the Judgment that the requirement of the State that the transgender applicants must undergo an operation or procedure for sterilization prior to having their sexual identity

recognised for the purposes of a passport or identity document was a breach of the State's positive obligation to protect the right to private life.

67 In its analysis of the Appellants' private rights challenge under Article 14 of the BOR, the Court of Appeal did not refer in its judgment to AP, Garçon and Nicot v France even though it was relied upon and cited to the Court of Appeal. The Court of Appeal only referred to and distinguished AP, Garçon and Nicot v France at paragraph 108 of its Judgment in the context of dismissing the Appellants' reliance on AP, Garçon and Nicot v France for a breach of Article 3 of the BOR .

68 The ECtHR adopted the same approach in X and Y v Romania (Applications Nos. 2145/16 and 20607/16, Judgment dated 19 January 2021). The applicants were refused official recognition of their sexual identity after a diagnosis of gender dysphoria and hormone treatment because they had not undergone a surgical operation (see paragraphs 102 and 145).

69 The ECtHR in X and Y v Romania noted at paragraph 161 that, as with the sterilizing treatment in issue in AP, Garçon and Nicot,

> "the surgical operation of sexual conversion on the genital organs that the Romanian courts required of the applicants, which they did not want to undergo, manifestly affects the physical integrity of the interested persons".

70 The ECtHR concluded at paragraph 165 that the applicants had been placed:

> "in a distressing situation inspiring feelings of vulnerability, humiliation and anxiety in them ... . In effect, as in the case of AP, Garçon and Nicot, the national courts placed the applicants, who did not wish to undergo a surgical operation of sexual conversion in front

of an insoluble dilemma: either undergo this operation involuntarily, and renounce the full enjoyments of their right to the respect for their physical integrity, which involves in particular the right to respect for private life guaranteed by Article 8 of the [ECHR], but also Article 3 of the [ECHR]; or renounce recognition of their sexual identity which also involves the right to respect for private life. It sees there a disruption of the fine balance that State parties are obliged to maintain between the general interest and the interests of the parties concerned".

The failure by the Court of Appeal to adopt the principles applied by the ECtHR

71 The primary defect in the Judgment of the Court of Appeal is (with respect) its failure to adopt the principled approach set out in the Judgments of the ECtHR. The Court of Appeal failed to proceed on the basis that:

(1) As it recognised, there is a narrow margin of discretion for the State in a context such as this where the Policy interferes with a most intimate and sensitive aspect of private life, that is a person's sexual identity.

(2) The Policy impermissibly requires the individual either to submit to intrusive and painful surgery for which there is no medical need or to accept that he cannot fully live and develop his private life in his acquired gender, with all the humiliation, distress and loss of dignity that involves.

(3) The Commissioner's reasons for applying the Policy (see paragraphs 75-90 below) come nowhere near providing an adequate justification for a Policy which has those effects, especially when there is no medical need for SRS (see paragraphs 36-42 above).

72 The Court of Appeal recognised at paragraph 74 of its Judgment[41] that it is well-established that the courts of Hong Kong have regard to judgments of the ECtHR as persuasive authority. However the Court of Appeal sought to limit the relevance of the ECtHR jurisprudence on which the Appellants rely:

(1) The Court of Appeal pointed out at paragraph 74(1) of its Judgment that the ECtHR plays a supra-national role under an international treaty. But notwithstanding that fact, this Court has frequently had regard - and understandably so - to the principles stated by the ECtHR in interpreting provisions of the ECHR similar to provisions of the BOR and the Basic Law.

(2) The Court of Appeal said at paragraph 74(2) of its Judgment that the judges of the ECtHR apply the ECHR "in accordance with what they perceive to be the developments in prevailing attitudes of the contracting states". But the ECtHR expressly recognised in AP, Garçon and Nicot at paragraph 122 (see paragraph 58 above) that there was "no consensus" amongst Contracting States on whether a sterility condition should be applied. The judgments of the ECtHR on which the Appellants rely were based on principles which that court saw as inherent in the concept of private life, principles which it derived from international recognition across the world: see AP, Garçon and Nicot at paragraph 125 (set out in paragraph 61 above).

(3) The Court of Appeal suggested at paragraph 80 of its Judgment[42] that the ECtHR cases "do not really address the proportionality issues". It is correct (as the Court of Appeal pointed out at paragraph

41 [A/6/108-110].

42 [A/6/112]

79 of its Judgment) that in X and Y v Romania the State did not attempt to justify the measures based on public interest (see paragraph 164 of that Judgment). But public interest justifications relating to certainty and inalienability were relied on by the State in AP, Garçon and Nicot at paragraphs 122 and 132 (see paragraphs 58 and 65 above).

(4) The Court of Appeal suggested, at the end of paragraph 74 of its Judgment, that a judgment of the ECtHR may be "fact sensitive". But the Judgments on which the Appellants rely set out relevant principles in relation to facts very closely analogous to those in the present case: the policy of the State of refusing to allow a transgender person to obtain identity documents congruent with their acquired sexuality unless they have had SRS. In any event, the reasoning of the ECtHR is applicable to the circumstances of Hong Kong: transgender people such as the Appellants who have no medical need for SRS are under pressure to give less than informed consent to surgery as the price of recognition of their sexual identity.

73 The suggestion by the Court of Appeal at paragraph 75 of its Judgment[43] that the ECtHR cases on which the Appellants rely "do not support the [Appellants'] case" is (with respect) unsustainable. The Appellants invite the Court to apply the reasoning of the ECtHR because it is highly persuasive and is based on a wealth of international material which recognises the scope and effect of the right to private life in the present context.

74 In any event, for the reasons set out at paragraphs 75-90 below, the Commissioner's reasons for applying the Policy do not provide an adequate

[43] [A/6/110].

justification for a Policy which has the effects summarised in paragraph 71(2) above.

The first suggested justification: "the only workable, objective and verifiable criterion"

75 The first purported justification advanced by the Commissioner is (see paragraph 52 of the Court of Appeal Judgment[44]) that:

> "a full SRS is the only workable, objective and verifiable criterion to enable a registration officer to determine the application".

76 That argument is (with respect) unsustainable.

77 The argument is inconsistent with experience around the world in addressing this issue. There are many other jurisdictions where transgender persons have been recognised under their acquired sexual identity for the purpose of official documents, such as passports or identity cards, without a requirement for SRS, but on production of a certificate or other evidence from a doctor or doctors. This is shown by the document produced by the Equal Opportunities Commission of Hong Kong in response to the consultation exercise by the Inter-Departmental Working Group on Gender Recognition ("IWG") and by the further evidence produced by the Appellants in the courts below. This evidence was not challenged by the Commissioner in the courts below. For example,

(1) The Australian States, the Canadian States, Belgium, Bolivia, Croatia, Ecuador, Estonia, France, Iceland, Italy, Netherlands, Norway, Germany, Portugal, Spain, Sweden, Ukraine, United Kingdom, around half of the United States of America, Uruguay, and Vietnam require a

[44] [A/6/98].

declaration plus medical evidence to be submitted to a Court or to the relevant government department or administrative authority without the need for SRS.

(2) Finland and Poland require a declaration, and medical evidence of sterilisation through hormone treatment but not SRS.

(3) Courts in Austria, Colombia, Greece, Hungary, Luxembourg, Romania, South Korea, Switzerland and Taiwan have ruled that applications to amend identity documents can be made to either to the courts or to the relevant administrative authority without need for proof of SRS.

There is no evidence before the Court that such a model has caused administrative difficulty in the above jurisdictions, far less difficulties of a sufficient degree to lead any of those countries to amend their legislation or policies to require SRS.

78 One example is the United Kingdom Gender Recognition Act 2004. Sections 2-3 provide that a person aged 18 or over is entitled to a certificate recording their acquired gender if that person can satisfy a Gender Recognition Panel that he or she:

(1) has or has had gender dysphoria;

(2) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made;

(3) intends to continue to live in the acquired gender until death; and

(4) the application is supported by a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need

not, practise in that field), or a report by a registered psychologist practising in that field and a report made by a registered medical practitioner (who may, but need not, practise in that field), such a report to include a diagnosis of the applicant's gender dysphoria.

SRS is not required. Nor is self-identification sufficient. There is no suggestion by the Commissioner that this scheme has resulted in uncertainty in the United Kingdom. Indeed, to the contrary: the main criticism of the 2004 Act is that it should go further and allow for self-certification without the need for medical reports.

79 The Court of Appeal stated at paragraph 68 of its Judgment[45] that "the schemes of gender recognition in other jurisdictions do not assist to inform the proportionality of the Policy". The Court of Appeal's reasoning and conclusion in that paragraph are (with respect) unsustainable:

(1) The Court of Appeal said that the various schemes:

> "are all jurisdiction-specific, reflecting their own constitutional traditions and collective values in addressing the intricate subject of gender recognition".

That is to miss the point: the relevance of these other schemes, for example that applied in the United Kingdom, is that they demonstrate beyond serious dispute that it is possible to apply a policy which does not involve the uncertainty which the Commissioner fears.

(2) The Court of Appeal added that the foreign examples are general schemes to address gender recognition for transgender persons

45 [A/6/106].

whereas the Policy is "an administrative measure" which:

> "serves the very limited purpose of enabling an applicant to apply to change the sex entry on the identity card".

Again, this is to miss the point: the relevance of the schemes applied in other countries is that they show that it is possible to devise a policy which addresses the sex identifier in official documents - such as passports and identity cards - without the uncertainty that the Commissioner fears. That the foreign legislative schemes, such as that in the United Kingdom, also extend to broader issues adds nothing to the point.

80 The Appellants emphasise that they are not asking the Court to specify the details of the scheme which should be adopted by the Commissioner. The Commissioner's concerns about uncertainty (as highlighted above) may be addressed if he were to adopt a policy which provides for assessment by specified doctors or a panel of specialists. The Appellants' complaint is that there is no scheme applied in Hong Kong except one which impermissibly requires SRS. The suggestion that SRS is necessary to avoid uncertainty is unsustainable.

81 The Court of Appeal expressed concern at paragraph 69 of its Judgment that to rely on a medical certificate (plus living in the acquired gender) would be inherently uncertain as to when a person born female becomes male. The Appellants respond:

(1) Such factors have not prevented the ECtHR, many states around the world and many international bodies (see paragraph 61 above) from recognising that a transgender person has acquired a new sex

without SRS.

(2) The ECtHR, other States and the many international bodies have done so because they have correctly given primacy to the right to private life and recognised the impermissibility of requiring a transgender person to undergo an invasive medical procedure before having their acquired sexual identity recognised by law. The Court of Appeal was approving a requirement for precisely such invasive surgery as a pre-condition of recognition of sexual identity.

(3) If, as is the case for these Appellants, a person has suffered from gender dysphoria, has lived in their acquired gender, has done all that is needed to satisfy expert medical practitioners that they are now men, it is not (with respect) for the Court of Appeal to impose a test of "sufficiently clear resemblance to the new sex in terms of biological appearance and characteristics" (paragraph 69 of the Court of Appeal Judgment) as the price of the Appellants being treated with respect and dignity in relation to an intimate aspect of their private life.

(4) It is especially inappropriate for the Court of Appeal to state such criteria when the evidence in support of this assertion is wholly speculative and without any objective basis. The Commissioner has, without any corroborating evidence, alleged that some doctors may be “too liberal” in their certification due to different standards amongst doctors and that his officers are not medically qualified to assess whether to accept such certificates or not[46]~~;~~.

[46] Mr. Tsui’s Affirmation, paragraphs28 and 32 [BB/8/132-133, 135-136].

(5) It is also especially inappropriate for the Court of Appeal to state such criteria when they have no medical validity as a test of when a person has acquired a new sex. As Dr Ho accepted for the Commissioner at paragraph 16 of his Affirmation[47] (see paragraph 41 above):

> "at present there is no general consensus amongst the medical profession in terms of explicit criteria as to when a person's change of sex is 'completed'."

Dr Winter's stated in his Affirmation at paragraph 60[48] (see paragraph 38 above) that:

> “there is a consensus among contemporary transgender healthcare providers that a transgender person’s change of sex is complete when their gender dysphoria is reduced to such an extent that enables them to live and be accepted as a member of their experienced gender. This therefore leads to what they consider as a full and happy life. They are the best judges thereof”.

See also assessment of medical evidence in AP at paragraph 114.

> “The vast majority of medical professionals rejected the idea that the transition process should necessarily and inevitably culminate in genital surgery.”

82 The suggestion that the requirement of certainty justifies the Policy is also undermined by the fact that the Policy itself recognises an exception of uncertain width: an applicant is not required to complete SRS if they can prove that they cannot undergo the surgical procedures for medical reasons

47 [BB/5/89-90].
48 [BB/11/182].

(see paragraph 13 above). There is no evidence before the Court as to what the Commissioner regards as "justifiable medical reasons". If the Policy is as necessary to avoid uncertainty as the Commissioner contends, it is inexplicable why those same adverse consequences do not follow if a transgender person is excused SRS for medical reasons.

The second suggested justification: "the practical difficulties which would be caused if the external physical appearance of the holder is incongruent with the sex entry" on the HKID

83 The second purported justification for the Policy (see paragraph 53 of the Court of Appeal Judgment) is that:

> "The requirement of full SRS is necessary to avoid the practical difficulties which would be caused if the external physical appearance of the holder is incongruent with the sex entry thereon".

84 The Court of Appeal accepted this argument at paragraph 72 of the Judgment[49]: it found that:

> "significant problems ... could (a) confront frontline staff who provide or operate various gender-specific public services and rely on identity cards to ascertain the sex of the card holder; and (b) affect other members of the public, if the transgender person's sex entry on the identity card does not correspond with his/her physical appearance, in particular of the sex organs".

85 Again, the reasoning of the Court of Appeal is (with respect) unsustainable:

(1) The difficulties suggested by the Court of Appeal have not prevented many countries, including the UK, from adopting schemes to allow a

[49] [A/6/108].

recognition of the acquired sex of a transgender person without SRS. Nor have any such perceived difficulties led to moves to change such schemes to impose a requirement for SRS.

(2) That is unsurprising. It is rare for a person to be required to display their sexual organs to those who provide or operate public services or to other members of the public. On the rare occasions (the Commissioner refers to hospital treatment and prison allocation etc) when that may occur, the individual will no doubt explain the discrepancy. Indeed, on those rare occasions, there will already be a discrepancy between the transgender person's physical appearance and their current HKID, which will need to be explained and addressed. Indeed, the question of whether to place the Appellants in a men's prison or a men's hospital ward arises whatever is said on their HKID.

(3) Far more likely to occur - indeed it is a regular occurrence - is that the Appellants display their current HKID which is at variance with their physical appearance and so will inevitably cause distress, humiliation and a loss of dignity to the Appellants who have to disclose why their current HKID states they are female and yet their appearance is male.

(4) To the extent that difficulties would arise if there were no SRS requirement, they would often be the consequence of embarrassment or prejudice by those who come into contact with transgender individuals. As the ECtHR said in Lustig-Prean and Beckett v United Kingdom at paragraph 90,

> "these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification

> for the interferences with the applicants' rights ..., any more than similar negative attitudes towards those of a different race, origin or colour".

(5) In any event, these supposed difficulties cannot outweigh the considerations which require a recognition of the acquired sex of a transgender person without SRS - that the Policy impermissibly requires the transgender person to choose between invasive and medically unnecessary surgery and protecting their right to private life.

<u>The third suggested justification: "hormonal and psychiatric treatments that precede full SRS are not absolutely irreversible"</u>

86 The third purported justification for the Policy (see paragraph 54 of the Court of Appeal Judgment) is that "hormonal and psychiatric treatments that precede full SRS are not absolutely irreversible" and this could cause difficulties. The example given by the Commissioner is of a female-to-male transgender person whose sex entry on his HKID is changed to male, but who then stops hormonal treatment, recovers fertility, becomes pregnant and gives birth.

87 The Court of Appeal accepted that argument at paragraph 70 of the Judgment:

> "irreversibility must be a key consideration ... . Short of a full SRS, the risk of reversibility identified by the Commissioner at [54] above cannot be ignored".

88 The Appellants respectfully submit that such concerns are insufficient to justify the Policy requirement for SRS:

(1) Such a "risk" has not prevented the ECtHR, many states around the

world and many international bodies (see paragraph 61 above) from recognising a transgender person's acquired sex without SRS.

(2) They have done so because they have correctly recognised that the "risk" is very remote indeed, and heavily outweighed by the daily, practical reality that transgender persons such as the Appellants suffer humiliation, distress and a loss of dignity in breach of their right to private life by being required to show a HKID which identifies them in a manner inconsistent with their acquired sexual identity. See Paragraph 114 of AP where the EctHR held:-

> "The requirement of an irreversible change in appearance … was based on an irrational fear that persons would change gender more than once; in fact, studies showed that this was unlikely to happen."

Therefore the ECtHR, other States and international bodies have given primacy to the right to private life and recognised the impermissibility of requiring a transgender person to undergo invasive and medically unnecessary surgery before having their sexual identity recognised by law.

(3) The United Kingdom Gender Recognition Act, section 2(1)(c), minimises any "risk" of the nature identified by the Court of Appeal by requiring the Panel to be satisfied, as a pre-condition of issuing a certificate, that the applicant "intends to continue to live in the acquired gender until death". That is a proportionate way of addressing this "risk".

(4) In any event, if, as the Commissioner stated (see paragraph 54 of the Court of Appeal Judgment[50]), the concern is fertility and conception, it is unnecessary to require anything_more than appropriate (and continuation of) hormone treatment. A requirement for sterilisation by surgical intervention imposes the unacceptable choice between invasive and medically unnecessary surgery and protecting a person's private life (raising concerns about informed consent see W v Registrar of Marriages (2013) 16 HKCFAR 112, paragraph 136 (Ma_CJ and_Ribeiro PJ) observing the undesirable coercive effect on persons not otherwise inclined to have the surgery)

Conclusion on Proportionality: Step 3

89 For the reasons set out in paragraphs 71-93 above, the Appellants submit that the Policy requirement for an SRS does not satisfy the test of proportionality and is therefore an unlawful breach of Article 14 of the BOR.

90 The arguments in favour of requiring SRS are weak (at best) and are very substantially outweighed by the damage to the Appellants' right to private life, in particular the distress, humiliation, and loss of dignity consequent on the Policy as a regular occurrence. Moreover, as the Court of Appeal accepted (see paragraph 45 above), Article 14 of the BOR covers also "the right to physical integrity". The Policy requires the Appellants to choose between accepting the regular distress, humiliation and loss of dignity or undergoing invasive and medically unnecessary surgery to which they do not wish to consent. The Court of Appeal stated at paragraphs 106-107 of the Judgment that because (in its view) the Policy is justified, it follows that the Appellants cannot complain of illegitimate pressure to consent to SRS. The Court of Appeal failed to understand that one reason why the Policy is

[50] [A/6/99].

not justified is precisely because it imposes on the Appellants the dilemma identified above, with the Appellants being under pressure to consent to invasive and medically unnecessary surgery which damages their bodily integrity in order to obtain respect for their private life. As the ECtHR recognised (see paragraph 65 above), imposing such an "impossible dilemma" on the Appellants is itself a breach of the fair balance which the right to private life protects.

Reasonable Balance: Step 4

91 As stated in Hysan at paragraph 135 by Ribeiro PJ for the Court (summarising what was said at paragraphs 70-80 of that Judgment), Step 4 requires the Court to consider:

> "whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual".

92 If the Appellants need to rely on Step 4, they submit that the Policy breaches a "reasonable balance" by imposing an SRS:

(1) First, the Court of Appeal was wrong (with respect) at paragraph 84 of its Judgment[51] to say that the public interests which justify the Policy

> "are immense and must weigh heavily on the balance".

On the contrary, in the Appellants' submission, the alleged public interests are speculative and remote. The removal of a requirement

[51] [A/6/113]

for SRS and the imposition of criteria such as (for example) those contained in the UK Gender Recognition Act are unlikely to cause difficulties as to certainty; the suggested problems as to a conflict between the contents of a HKID and the display of sexual organs are unlikely to occur; the suggested unease or embarrassment or complaints that front-line public officers may face[52] ought to be dealt with by education and training; and there are unlikely to be many (if any) cases of a female-male transgender person giving birth.

(2) By contrast, the damage to the Appellants' private life by needing to show their HKID is regular and substantial. The Court of Appeal said at paragraph 85 of the Judgment[53] that it was:

> "profoundly conscious of the hardship that the [Appellants] have to endure in this regard".

The Appellants are regularly required to show their HKID - indeed that is the purpose of the HKID. On each such occasion, the Appellants are caused distress, humiliation and a loss of dignity by having to reveal to strangers intimate details of their private life. Moreover, the Appellants are presented with a dilemma of either having invasive and medically unnecessary surgery or, on the other hand, accepting intrusive interferences with a most intimate aspect of their private life.

(3) The Court of Appeal said (at paragraph 85 of its Judgment[54]) that it may be possible for the Appellants to use their British passports. But

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52 See Wong's Affirmation mentioning "embarrassment" of public officers at paragraphs 7, 8, 10, 12, 13, 15, 17 [BB/6/97-104]

53 [A/6/114]

54 [A/6/114]

immigration officers, police officers, other officials and private suppliers (such as banks) often demand (as they are entitled to do) to see the HKID of a resident of Hong Kong. There is a legal requirement in Hong Kong for every lawful resident to apply for and to carry a HKID card, and to present it to police or immigration officers when asked to do so: see paragraphs 20-21 above. There is no evidence in this case that UK passports are acceptable alternatives in practice. In any event, for the Appellants to explain why they are using a British passport despite being permanent residents of Hong Kong would itself require an explanation that intrudes into their private life.

(4) It is also no answer nor was there evidence for the Court of Appeal to say (at paragraph 85 of its Judgment[55]) that in other respects, the Appellants can "continue to live in their acquired gender comfortably". These proceedings are concerned with their inability to obtain a HKID in their acquired gender and the intrusion into their private lives thereby occasioned. It is nothing to the point that the intrusions could be even worse.

55 [A/6/114]

Conclusion

93 For all the reasons set out above, the Appellants invite the Court to allow this appeal and grant a declaration that the Policy breaches Article 14 of the BOR by imposing a requirement on them for an SRS as a condition of them receiving, as permanent residents of Hong Kong, HKID cards stating their male gender.

LORD PANNICK KC

HECTAR PUN SC

EARL DENG

9 December 2022